The United States' Double Standard Regarding Domestic Enforcement of International Arbitration Awards

I. INTRODUCTION

Even though negotiation is the most frequently used and commonly accepted method employed when an international dispute arises,[1] international arbitration leads the way in solving these disputes when negotiation seems futile. International arbitration has become the innovative mechanism available to parties of separate states who cannot resolve their differences through negotiation and want to avoid formal court proceedings.[2] This is evidenced by the recent maturation of arbitration in the area of commercial disputes. Today, the world is a much smaller place than it used to be. As a result, there are more transactions between the states of the world involving trade and investment, and therefore an efficient mechanism is necessary to quickly solve disputes in order for relationships to remain harmonious.

An example of the need for quick settlements is the recent and expedient creation of the International Centre for the Settlement of Investment Disputes (ICSID), which is an organization created to deal exclusively with investment disputes.[3] The main purpose behind the creation of the ICSID was to make available an organization to which parties could turn in order to quickly resolve disputes. Other evidence of the need for a quick response to an international dispute has been shown by the willingness of parties creating international agreements to include a clause in the agreement establishing ad hoc arbitral tribunals to handle any dispute that may arise under the agreement.[4] These tribunals are created

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1. J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 2 (1984).

2. *See* notes 13-19 and accompanying text. Parties try to avoid formal court proceedings because they are very costly and time consuming. Only large corporations are usually willing to attempt litigation because they have the resources available to mount successful attacks. But today even these large corporations are not as willing as they once were to attempt litigation because their profit margins have plummeted during the past few years.

3. GEORGES DELAUME, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 23-24 (J. Lew ed., 1987). The ICSID was created in 1966 to deal specifically with investment disputes. It is sponsored by the World Bank and has been relatively successful due to the financial support received from the World Bank.

4. Barry Carter, *The Opportunities and Limits of Legal Remedies in Foreign Investment Disputes, in* MANAGING INTERNATIONAL POLITICAL RISK: STRATEGIES AND TECHNIQUES 65 (F. Ghadar, et al. eds., 1983).

and governed by rules established by the contracting parties.[5] The parties in turn usually draw upon rules constructed by other well-established international arbitral organizations, such as the ICSID.[6] The problem with these institutional organizations and ad hoc tribunals does not come from the decision to use such devices but from the ability to enforce the award once rendered.

Once the parties from two different states agree to have any dispute pertaining to the international agreement submitted to an international arbitrational panel or an ad hoc tribunal, it is unclear whether or not a decision executed by that panel will be enforced by the states of the world where the losing party has assets sufficient to satisfy the award, or where the party is a national of that particular state. In an attempt to solve this dilemma, this Comment will evaluate two sets of rules which will hopefully help answer that question. First, the doctrine which governs international transactions is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[7] Second, the controlling statute of most arbitrations that occur in the United States is the Federal Arbitration Act (FAA).[8]

This Comment will discuss whether an arbitration award arising out of a controversy between a United States citizen or corporation and a foreign citizen or corporation will be regarded as a domestic award under United States law.[9] This distinction is critical because it will determine

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5. *Id.* These ad hoc tribunals are created solely by the parties forming the contract. The parties pick who will make up the arbitral panel, what administrative and procedural rules they will follow, and the process, if any, which must be followed to appeal a decision.

6. *Id.* Not only does the ICSID have a well established set of rules that parties to international agreements can use but the International Chamber of Commerce, the American Arbitration Association, and the Stockholm Chamber of Commerce have established rules for conducting arbitration proceedings.

7. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, *reprinted in* 9 U.S.C. §§ 201-208 (1988) [hereinafter Convention].

8. Federal Arbitration Act 9 U.S.C. §§ 1-14 (1982) [hereinafter FAA]. As will be discussed later, the FAA applies to domestic arbitration awards. This does not mean that all foreign arbitration awards will fall outside the gambit of the FAA. This is due to United States courts treating some foreign arbitral awards as domestic, which may be an incorrect classification. *See infra* notes 47-57 and accompanying text.

9. "[A domestic] award is the decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them" by two parties which are nationals of, or the subject matter is so intertwined with, the United States that this country has complete and absolute control over the dispute. *See* BLACK'S LAW DICTIONARY 137 (6th ed. 1990).

whether the FAA or the Convention is applied.[10] If the award is classified as domestic, even if an international panel renders the decision, U.S. courts will apply the FAA. This application has far reaching ramifications for the party who loses the arbitration because the FAA is narrowly tailored as to when arbitration awards can be vacated.[11] On the other hand, the Convention has more defenses which can be implemented by the losing party in order to render the award worthless.[12] It is this

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10. *See* Convention, *supra* note 7, Article 1. Article 1, clause 1 of the Convention specifically states that if an award is classified as a domestic award, it will not be covered by the Convention. Therefore, the FAA will cover all awards which are classified as domestic awards.

11. The following are grounds to vacate the award under the Federal Arbitration Act: (1) fraud; (2) bias or corruption of the arbitrators; (3) misconduct of the arbitrators which caused prejudice to a party; or (4) where an arbitrator exceeded the scope of his authority. 9 U.S.C. § 10 (1988).

12. Article V of the New York Convention provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> > (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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> > (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
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> > (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
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> > (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

author's contention that when a United States citizen or corporation is attempting to enforce an arbitration award in the U.S. against a foreign entity, the courts are more likely to treat the award as a domestic award or read the Convention narrowly so as to prevent the party who is seeking to vacate the award from doing so. On the other hand, when a foreign entity is seeking to enforce the award in the United States against a U.S. citizen or corporation, the settlement will not be considered a domestic award, moreover, the Convention will be interpreted broadly so that the award can be easily vacated.

This Comment will support this belief through its three major sections and short conclusion. First, this Comment will discuss the legal framework of both international arbitration generally and international arbitration within the United States with emphasis on the FAA and the Convention. Second, this Comment will focus on the enforcement of foreign arbitral awards beginning with a background discussion which indicates that states previously did not like to enforce arbitral awards which were not rendered by its domestic courts. The discussion will then turn to the enforcement mechanisms available to the party receiving a favorable judgement. The Comment will then present a short discourse concerning the resistance to enforcement which still exists today. Finally, this Comment will look at the treatment of defenses against enforcement of arbitral awards by courts within the United States by creating a hypothetical controversy to illustrate the situation. This dispute will attempt to demonstrate that U.S. courts treat situations differently when a U.S. citizen or corporation is attempting to enforce an agreement against a foreign party rather than a foreign citizen or corporation attempting to enforce an agreement against a U.S. party. Finally, the Comment will determine whether or not the hypothesis posed is correct.

> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
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> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
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> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Convention, *supra* note 7, art. V, 21 U.S.T. 2517, 2520.

II. INTERNATIONAL ARBITRATION, U.S.' INTERNATIONAL ARBITRATION

A. The Legal Framework of International Arbitration

Arbitration, unlike formal court proceedings, receives its legitimacy from the consent of the parties to an agreement or existing dispute.[13] Consent can be arranged by having the parties articulate in their agreement that if any dispute arises regarding the interpretation or implementation of the agreement, that they will settle the dispute through arbitration. On the other hand, if the dispute arises and parties have not stipulated in the agreement that they will handle a dispute through arbitration, they can still avoid formal court proceedings by agreeing to arbitrate the dispute.

Why would the parties to an international agreement or an existing international dispute want to submit their disputes to international arbitration? Arbitration simply has more advantages than settlement of a dispute using conventional norms. The leading problem associated with the usefulness of arbitration is the fact that lawyers are unfamiliar with the process and will forgo implementing this alternative.[14] However, the benefits of arbitration greatly outweigh this problem and attorneys would surely benefit if they took the time to learn the procedures.

Arbitration is a process of neutrality. The arbitrators are neutral and need not apply the law of the state in which the dispute arises. Neutrality ensures that the foreign party is not biased by the implementation of local laws or by unfamiliarity with a foreign court system.[15] Arbitration is inexpensive and efficient when compared to formal court proceedings.[16] The parties are permitted to pick and choose

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13. Robert von Mehren, *From Vynoir's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT'L L. 583 (1986).

14. Michael H. Straub, Jr., Note, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031, 1035 (1990).

15. Jan Paulsson, *The Role of the Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 212 (1981); Jay Lawrence Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 595 (1983).

16. RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE 10 (1885); Robert Coulson, *So Far, So Good: Enforcement of Foreign Commercial Arbitration Awards in United States Courts, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 353, 353 (J. Lew ed. 1986); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 747 (1989) (noting that a "major incentive for international commercial arbitration...is its promise of simplicity, economy, supra-neutrality and speed").

who the arbitrators will be.[17] Selecting the arbitrator is very beneficial to parties because they can select individuals who have expertise in the law and the trade customs encompassing the particular industry involved in the dispute, instead of submitting the dispute to a judge who has only general knowledge of the law controlling that industry.[18]

Arbitration is also beneficial to the public because private disputes are handled in private ways, thus avoiding the use of national courts. By using arbitration, states will save money, since not all disputes will end up in court. Using arbitration will also enable the courts to handle more disputes that involve public as opposed to private interests.[19]

Once the parties have agreed to submit their dispute to arbitration, they must agree upon what arbitral institution they will retain to govern the proceedings. This decision should not be taken lightly since different institutions have varying rules governing the handling of a dispute. When an attorney drafts an agreement which provides for arbitration through an arbitral clause or submission agreement, there are basically four arbitral institutions to which a dispute can be referred.

First, the International Chamber of Commerce (ICC) established a Court of Arbitration during the 1930's.[20] The Court is not a judicial court, but rather is composed of tribunals of one or three arbitrators who apply the Court's well established procedural rules, known as the Rules of Conciliation and Arbitration of the International Chamber of Commerce.[21] The Court of Arbitration is not used as much as some of the other institutions because it fixes both the administrative charges and the arbitrators' costs based on graduated schedules founded on the percentage of the amount of the total claim, rather than imposing charges only to cover actual expenses accrued as do other arbitral institutions.[22] Also, fewer disputes are being referred to the ICC since there is no effective enforcement mechanism once a decision is handed down.

Second, the International Centre for the Settlement of Investment Disputes (ICSID) has gained wide-spread popularity over the past few years. As will be discussed in further detail below, the ICSID has established an elaborate doctrine of rules and regulations which are to be

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17. ALBERT VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1 (1981).

18. *Id.*

19. Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW 187, 198 (1989).

20. Carolyn B. Lamm, *Recent Developments in International Arbitration*, 36 FED. B. NEWS & J. 276 (1989).

21. *Id.* at 277. *See generally* Carter, *supra* note 4, at 65.

22. *See* Lamm, *supra* note 20, at 277.

implemented when a signatory to the ICSID Convention brings a dispute to the tribunal.[23] Once the ICSID renders a decision, that decision must be enforced by all the signatories to the ICSID Convention.[24] However, problems arise when one party attempts to collect from a party who has assets in a state not a signatory to the ICSID Convention, or when the state is unwilling to enforce the award. These problems will be discussed throughout the remainder of this Comment.

The popularity of the ICSID stems from its comprehensive set of rules called the Rules of the International Centre for the Settlement of Investment Disputes created by the international convention establishing the ICSID in 1966.[25] These rules ensure that signatories to the convention, once they have consented to ICSID arbitration, cannot refuse to arbitrate,[26] will be treated fairly whether they are the breaching party or not since the ICSID is free from the control of domestic courts,[27] and will not be subject to outrageous expense because the ICSID only requires payment to cover the actual costs of the arbitration.[28] The ICSID is of vital importance because it requires every signatory to the convention "to recognize any such awards and enforce the pecuniary obligations imposed by the award as if it were a final judgement of a court in the recognizing state."[29]

Third, the American Arbitration Association (AAA) has created a set of rules called the Commercial Arbitration Rules of the American Arbitration Association. The AAA rules have gained growing importance in the arena of international arbitration in recent years.[30] Like the other rules previously mentioned, the AAA rules are well established, and are important in conducting arbitral proceedings.[31] However, unlike the ICSID, the AAA rules provide no mechanisms for enforcement of the

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23. *See* Carter, *supra* note 4, at 64-68.

24. *See* Delaume, *supra* note 3, at 24.

25. *See* Carter, *supra* note 4, at 65.

26. *See* Delaume, *supra* note 3, at 23.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See* Carter, *supra* note 4, at 65. The AAA, though based in the United States, "handles hundreds of international cases annually, many of them involving substantial sums." ROBERT COULSON, BUSINESS ARBITRATION--WHAT YOU NEED TO KNOW 121 (3d ed. 1986).

31. For a general discussion of the rules formulated under the AAA *see* Coulson, *supra* note 30 at 121-123. Even though this is an organization established within the United States and which has adopted various rules found in the United States governing arbitration proceedings, many foreign parties have decided to use the rules of the AAA when creating ad hoc tribunals.

award once the decision is relinquished.[32]

Finally, if the contracting parties do not want to submit their dispute to a particular institutional arrangement created to solve disputes through arbitration but still want to arbitrate, the parties can either create their own rules and pick the arbitrators[33] or, they may decide to adopt a set of rules that are already firmly established, choose the arbitrators, and then have the dispute settled.[34] An ad hoc arrangement enables the parties to choose firmly rooted rules instead of creating a new set of rules which would be extremely time consuming and frustrating. While the parties avoid fees charged by the particular institution, they still benefit from the organization's established rules.[35]

Once the agreement to arbitrate has been finalized, the institution which will hear the dispute has been chosen, and a dispute exists, all that needs to be answered is how a decision will be enforced once the arbitrators have rendered a decision.

Early in the history of international arbitration a concern developed which focused on the ability to enforce arbitral awards once they were furnished.[36] This concern focused on the premise that "an award that cannot be enforced is worthless."[37] If this problem could not be solved, arbitration on the world stage would not be a viable alterative to formal court proceedings. In order to solve this problem, some type of international law had to be enacted. However, international law can only be created by custom,[38] treaty,[39] international organizations,[40] through

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32. If a party does not voluntarily comply with an award rendered by the AAA, the party seeking enforcement of the award must turn to the courts of the state the party has assets to cover the award in order to force that party to comply with the AAA decision. *See* Coulson, *supra* note 30 at 121-129 for a general discussion of the AAA.

33. *See* Carter, *supra* note 4, at 65.

34. *Id.* at 64-68. *See also*, JOHN LIDDLE SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 1-40 (1959) (a historical analysis of how ad hoc tribunals have gained acceptance as a worthwhile device that can successfully be used in arbitration).

35. The parties need only pay an international arbitration organization when they have requested the organization to hear the dispute, apply its rules, and have an award rendered by its arbitrators.

36. Albert Van den Berg, *Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions*, 2 ICSID REV. 439 (1987).

37. J. Sorton Jones, *International Arbitration*, 8 HASTINGS INT'L & COMP. L. REV. 213, 222 (1985).

38. JOSEPH GABRIEL STARKE, INTRODUCTION TO INTERNATIONAL LAW, 34-38 (9th ed. 1984).

39. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, 77 (1991).

40. MALCOLM N. SHAW, INTERNATIONAL LAW, 602-03 (2d ed. 1986).

principles which are believed to be so important to the international community that divergence is not permitted,[41] or through the United Nations General Assembly which has the power to make recommendations which can eventually lead to the creation of international law by custom.[42] For the purposes of this Comment, the only concept of importance is the creation of international law through the United Nations General Assembly.

In 1958 the states of the world came together within the United Nations to draft and pass the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[43] "The purpose of the 1958 Convention was to promote international arbitration by ensuring enforcement of foreign arbitral awards in each acceding nation's courts."[44] The mechanisms of the Convention are intended to provide a structure by which arbitration can be conducted successfully in the international arena.[45]

B. The United States and International Arbitration Law

Prior to the Convention, the United States had its own version of a doctrine intended to promote arbitration; however, the doctrine encouraged arbitration over formal court proceedings only when the dispute involved domestic commercial or contractual agreements. This doctrine was passed in 1925 and is today still called the Federal Arbitration Act (FAA).[46] Congress did not envision the FAA dealing with non-commercial, private disputes, or disputes involving governmental entities.[47] In addition, the FAA proved to be an unsuccessful device when it came to helping foreign entities who attempted to have foreign

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41. *Id.* at 81-84. These principles are usually referred to as general principles of law.

42. UNITED NATIONS, BASIC FACTS ABOUT THE UNITED NATIONS, 1-17 (1989). The United Nations General Assembly has no inherent power to create international law but can pass resolutions and suggest law through conventions. If the states of the world begin to adhere to a resolution or a particular convention, an international law will begin to emerge because law is being created through custom.

43. *See* Convention, *supra* note 7.

44. Heather R. Evans, Note, *The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts*, 21 N.Y.U. J. INT'L L. & POL. 329, 329 (1989).

45. Hazel Fox, *States and the Undertaking to Arbitrate*, 37 INT'L & COMP. L.Q. 1, 1-2 (1988).

46. *See* FAA, *supra* note 8.

47. *Id.*

arbitral awards enforced in the United States.[48]

Due to the fact that the FAA was not capable of helping foreign parties enforce foreign arbitral awards, coupled with the fact that policy makers finally understood the importance of international arbitration, the United States became a signatory to the Convention in 1970.[49] There is a divergence of opinion as to whether the Convention should be considered as a separate doctrine instead of as a part of the FAA. Some scholars argue that the Convention is a component of the FAA, thereby making the FAA the only source of statutory law dealing with the enforcement of international arbitral awards.[50] Others argue that the Convention and the FAA are independent of each other, thus creating two sources of statutory law within the United States dealing with this one subject.[51]

This divergence of opinion has great implications because each document has a separate set of defenses which may be implemented to prevent the enforcement of an arbitral award. If only one document exists, then only one set of exceptions exist because the two instruments have been fused together. However, if the documents are considered separately, two sets of exceptions exist. When this occurs, a court will have to decide two important issues. First, it must decide which document takes precedence. Second, if the FAA takes precedence, the court must decide whether this document can be applied to a foreign arbitral award even though it was not intended to cover such issues.[52] The position that seems to be taken more often than not is that the two documents form one complete doctrine.[53]

This proposition helps support the hypothesis because the FAA has narrowly tailored exceptions to the enforcement of arbitral awards, no matter if it is applied to a foreign or domestic award. Therefore, courts have fewer exceptions to which they can apply their judicial magic, thus creating less opportunity for an entity of the United States to benefit from

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48. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1058 (1961).

49. *See* Convention, *supra* note 7.

50. *See* Michael F. Hoellering, *Provisions of U.S. Law on Arbitration Agreements, in* AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW: 1987-88, 170 (1988).

51. *See* Van den Berg, *supra* note 17, at 7; Stewart C. Boyd, *Commentaire, in* PROCEEDINGS OF THE 1ST INTERNATIONAL COMMERCIAL ARBITRATION CONFERENCE 393, 394 (N. Antaki & A. Prujiner eds., 1985).

52. *See supra* notes 46-49 and accompanying text.

53. The reason for this belief comes from the fact that the Convention is a part of the FAA as is evidenced by the fact that the FAA was amended in 1970 to make the Convention a part of it.

a broad interpretation which could ultimately lead to the award not being enforced.[54] On the other hand, if the documents are treated as one, courts can interpret the defenses to enforcement in ways which will benefit entities from the United States because the exceptions in the Convention are broadly stated to provide wide latitude for interpretation by the states of the world.[55]

III. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

A. Background

"Historically, Anglo-Saxon courts opposed the arbitral process."[56] The reason for this dislike stems from the fact that English judges received their salary according to how many cases they heard.[57] On the other hand, judges gave the reason that arbitration was an unnecessary evil and that such a device would "oust" them of their jurisdiction.[58] This was a poor explanation for their refusal to allow arbitration or enforce arbitral awards. However, this doctrine, which became known as the "ouster" doctrine, became part of American law.[59]

This history, and the explanation of the progression of arbitration within the United States which follows, are necessary to understand the proposed hypothesis. In the early nineteenth century, arbitration emerged as a viable alternative to formal court proceedings. The Supreme Court openly believed that a policy demanding compliance with arbitral awards rendered before judicial proceedings began and entered into with the consent of both parties when a dispute existed should be strictly followed.[60] The Supreme Court also stated that arbitral awards should receive judicial encouragement and should not be set aside for mistakes of law or fact as long as the hearing was full, fair, and the arbitrators were

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54. *See supra* note 11 and accompanying text. There are only four defenses available under the FAA and only defense (4) seems to provide any room for judicial interpretation.

55. *See supra* note 12 and accompanying text.

56. Straub, *supra* note 14, at 1035. *See also* Kill v. Hollister, 95 Eng. Rep. 532, 532 (1746); Vynoir's Case, 77 Eng. Rep. 597, 597 (1611).

57. Straub, *supra* note 14, at 1039.

58. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).

59. Insurance Co. v. Morse, 87 U.S. 445, 451 (1874) (holding that parties cannot make agreements to oust a court of jurisdiction prior to the existence of a dispute).

60. Karthaus v. Yllas Ferrer, 26 U.S. (1 Pet.) 222, 228 (1828). "It is a settled rule, in the construction of awards, that no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it." *Id.*

honest and impartial.[61]

The Supreme Court was reluctant, however, to permit all forms of arbitration. The Supreme Court and the lower federal courts were unwilling to enforce agreements to arbitrate that were found in contractual agreements prior to the existence of a dispute.[62] These clauses were said to be "revocable and non-enforceable."[63] The Supreme Court went further and said that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all laws or all those courts may afford him."[64] In a civil case, a party could consent to submit his case to arbitration, but a person could not obligate himself or herself by writing a clause in an agreement requiring arbitration whenever a dispute arises, because the Court believed a person could not forfeit his or her rights before a dispute existed.[65] In addition to this restriction, no legislation or court decision specifically dealt with the problem of enforcement of an arbitral award once a decision was rendered. Compliance was voluntary, and if the losing party did not adhere to the decision, the winning party had to utilize the court system and suffer the inconveniences associated with that system which he or she was originally trying to avoid. Finally, no instruments existed which could successfully deal with the enforcement of foreign arbitral awards. This could have been due to the small number of international transactions taking place which could give rise to the need for mechanisms to deal with international disputes. Therefore, arbitration was not of great importance to the states of the world, thus explaining why there were no devices in the United States available to deal with international disputes.

As time passed, courts in the United States realized how beneficial arbitration could be in reducing case loads and began to encourage voluntary arbitration when the situation warranted. However, the courts were still unwilling to make large advances in this area without Congressional approval.[66] Therefore, in 1925, Congress passed the FAA,[67] which opened the door for courts to extend the practice of encouraging arbitration. However, after the passage of the FAA, courts

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61. Burchell v. Marsch, 58 U.S. (17 How.) 344, 350 (1854). Here the Court held that, "[c]ourts should be careful to avoid a wrong use of the word 'mistake', and, by making it synonymous with mere error of judgement, assume to themselves an arbitrary power over awards." *Id.*

62. *See* von Mehren, *supra* note 13 at 590.

63. *Id.* at 589-590.

64. Insurance Co. v. Morse, 87 U.S. 445, 451 (1874).

65. *Id.*

66. *See* von Mehren, *supra* note 13.

67. *See* FAA, *supra* note 8. The Act was first enacted in 1925, at 93 Stat. 883.

were hesitant to permit unabridged arbitration domestically and were even more reluctant when it came to international matters. The courts, as well as Congress, refused to get involved in international arbitration. One illustration of this position is the refusal of the United States to become a signatory of the 1958 Convention dealing with the enforcement of international arbitral awards until 1970.[68] This reluctance could have been due to the world outlook (stressing peaceful co-existence and isolationism) that existed during this period which shaped international relations between states.[69]

Today, the courts are willing to permit arbitration, as exhibited by recent U.S. court decisions which allow domestic[70] as well as international arbitration.[71] Furthermore, courts have rendered decisions which permit parties to private agreements to include forum selection clauses. By allowing such devices, the courts have virtually done away with the "ouster" doctrine.[72] Also, courts have held that parties may include clauses in their international agreements which specifically state that the settlement of any dispute arising under the agreement will be resolved through arbitration.[73] Unfortunately, the Supreme Court has remained silent on the issue of enforcement of foreign arbitral awards. This silence has caused numerous problems because it has left the lower courts with little guidance as to how the FAA and the Convention should be applied, ultimately leaving judges confused and uncertain on how to

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68. *See* Convention, *supra* note 7. Even though the Convention was opened for ratification in 1958, the United States refused to become a signatory until twelve years later.

69. *See* Shaw, *supra* note 40, at 30. "War was no longer regarded as inevitable between capitalist and socialist countries and a period of mutual tolerance and co-operation was inaugurated." *Id.*

70. *See, e.g.*, Scherk v. Alberto-Culver, 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); New England Energy, Inc. v. Keystone Shipping Co., 885 F.2d 1 (1st Cir. 1988), *motion denied*, 489 U.S. 1007, *and cert. denied*, 489 U.S. 1077 (1989); DeCantis v. Mid-Atlantic Toyota Distributors, Inc., 371 F. Supp. 123 (E.D. Va. 1974).

71. *See, e.g.*, Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981); Essex Cement Co. v. Italmare, S.p.A., 763 F. Supp. 55 (S.D.N.Y. 1991). This is a very small representation of the vast number of cases involving foreign arbitration heard by courts in the United States.

72. Zapata Off-Shore Co. v. M/S Bremen, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir. 1971), *cert. granted sub nom.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

73. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

proceed.[74]

B. Enforcement Mechanisms

In general, parties voluntarily comply with arbitral awards.[75] However, arbitral awards are not self-executing. If one party refuses to abide by the arbitrator's decision, that award must be turned into a judgement which can be administered by the mechanisms of the state created for enforcement purposes.[76] Arbitration loses its advantages[77] over litigation if resort must be made to the judicial system of another country. Therefore, enforcement of arbitral awards has become the principal threat to the increasing use of arbitration in solving international disputes between parties of differing nationalities.

To learn about how the international community deals with the problem of enforcement of arbitral awards, one can look to either the ICSID or the Convention. As discussed previously,[78] the ICSID requires all signatories to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States to treat all arbitral awards as if they were the final judgement of a court of that state.[79] This requirement has had the effect of making almost all awards rendered by the ICSID enforceable in any state in which the losing party has assets as long as that state is a signatory to the ICSID Convention.

The Convention is the statutory law which governs the enforcement of arbitral awards in the international arena. The Convention requires "each contracting state [to] recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."[80] Therefore, if a state is a member of the Convention it has a duty and an obligation to enforce

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74. *See* Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974). The decision reached by this court shows its willingness to construe the defenses narrowly so as to prevent parties from being able to avoid the enforcement of foreign arbitral awards. But this was just one court's interpretation, and the court was not sure if this was the proper avenue to pursue.

75. *See* George Goldberg, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 59 (2d ed. 1983); Pierre Lalive, *Enforcing Awards, in* INTERNATIONAL CHAMBER OF COMMERCE, 60 YEARS OF ICC ARBITRATION--A LOOK AT THE FUTURE 317, 319 (1984).

76. *See* Fox, *supra* note 45; V.S. Deshpande, *Enforcement of Foreign Awards in India, U.K., and U.S.A.*, 4 J. INT'L ARB. 41, 43 (1987); *See also* Straub, *supra* note 14, at 1044.

77. *See supra* notes 13-19 and accompanying text for a complete discussion of the advantages associated with arbitration.

78. *See supra* notes 24-30 and accompanying text.

79. *See supra* note 30 and accompanying text.

80. Convention, *supra* note 7, art. III, 21 U.S.T. 2517, 2519.

awards declared by international arbitral panels created under the auspices of the Convention.

In 1970 the United States became a signatory to the Convention. In that same year, the United States made the Convention part of its law by amending the FAA.[81] Therefore, since the United States is a signatory, it must abide by the aforementioned requirement in its international commercial relationships.[82]

C. Resistance to Enforcement

Enforcement is not automatically achieved just because an award is handed down by an arbitral panel. Under Article V of the Convention, recognition and enforcement of an award may be denied.[83] However, it is important to keep in mind that the primary goal of the Convention was to remove hurdles which hindered enforcement.[84] Therefore, courts in the United States have routinely required that the party resisting enforcement shoulder the burden of proof.[85]

As discussed earlier,[86] the FAA is another source which may be available to the party opposing enforcement of an arbitral award.[87] Unlike the Convention, the FAA grounds to vacate an award are extremely narrow. Therefore, if the FAA is applied to an arbitral award and a party attempts to resist enforcement, the chances of a successful attempt will be greatly reduced.

From the facts and circumstances of the cases discussed in this Comment, it will become clear to the reader that the FAA will not apply to these cases and fact patterns which are similar to these disputes. This is due to the fact that a dispute which involves international arbitration will have at its origin an international commercial dispute. The decisions which are rendered in such controversies are clearly not considered

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81. 9 U.S.C. §§ 201-208 (1988).

82. *See* Convention, *supra* note 7, art. III, 21 U.S.T. 2517, 2519.

83. *See* Convention, *supra* note 12, art. V, 21 U.S.T. 2517, 2520.

84. Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie du Papier (RAKTA), 508 F.2d 969, 973-74 (2d Cir. 1974).

85. *See* Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1364 n. 11 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976); American Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd., 659 F. Supp. 426, 428 (S.D.N.Y. 1987), *aff'd* 828 F.2d 117 (2d Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1252 (E.D.N.Y. 1988).

86. *See supra* notes 11, 47-56 and accompanying text.

87. *See supra* note 11 and accompanying text.

domestic awards[88] and Congress has said that the Convention will apply to such disputes, not the FAA.[89] Furthermore, the FAA was specifically implemented to deal with domestic arbitration.[90] The FAA was recently amended to reflect the importance of international arbitration by incorporating the Convention into the FAA.[91] It would be hard to imagine a congressional intent other than the one indicating a desire for the Convention to govern international arbitrations.

As previously mentioned, this has important ramifications on a party attempting to have an award vacated.[92] Since the exceptions under Article V of the Convention can be construed broadly to thwart enforcement, a party would be better off having the Convention rather than the FAA apply. Therefore, since the Convention will be applied by the courts in the United States when a party attempts to enforce an award, the opposing party has two advantages. One, the party has more defenses at its disposal that can be argued which may lead to the non-enforcement of the award.[93] Two, courts in the United States may be willing to construe the defenses broadly in order to prevent enforcement.[94]

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88. *See supra* note 9 and accompanying text.

89. By becoming a signatory to the Convention, the United States must abide by its requirements. Article I of the Convention states that this doctrine shall not apply to domestic awards. Therefore, in the United States, the FAA will govern any award classified as domestic.

90. *See* FAA, *supra* note 8.

91. *See* 9 U.S.C. §§ 201-208 (1988).

92. *See supra* notes 47-56 and accompanying text.

93. *See* Convention, *supra* note 12, art. V, 21 U.S.T. 2517, 2520.

94. The exceptions found under Article V of the Convention are broadly stated leaving wide latitude for interpreting exactly what they mean. For example, Article V clause 2(b) is a catch-all phrase stating that "the recognition or enforcement of the award would be contrary to the public policy of that country." It is very difficult to determine what "contrary to the public policy" means, leaving the door wide open for courts to apply their judicial magic.

IV. TREATMENT OF DEFENSES AGAINST ENFORCEMENT OF ARBITRAL AWARDS BY COURTS WITHIN THE UNITED STATES

A. Smith & Jones Import Co. v. Commonwealth of Independent States Manufacturing Co., *A Hypothetical Examination to Illustrate the Situation*[95]

A hypothetical case can best demonstrate how courts in the United States may attempt to apply the Convention in the future if they are not already doing what this Comment suggests has been taking place. Smith & Jones Import Co. (Smith) is a corporation incorporated in and conducting most of its business within the United States. With the recent elimination of Communism and the emergence of democracy and a market economy within the Commonwealth of Independent States (formerly the Union of Soviet Socialist Republics), Smith feels the time is ripe to export to the Commonwealth a product which the Communist system has prevented from being introduced legally into the country -- blue jeans. The sale of blue jeans has been so favorable that Smith has decided to avoid the high export costs by opening a manufacturing plant in the Commonwealth. Due to certain laws in the Commonwealth, Smith may not directly own the new plant, and therefore a contract has been concluded between Smith and the Commonwealth of Independent States Manufacturing Company (CISMC). The contract gives CISMC the right to produce blue jeans but must direct all questions concerning the operation of the plant to Smith who must then give a timely response. The contract also has an elaborate section dealing with the return of investment that Smith must realize within the first ten years of operation, as well as a clause providing CISMC with an opportunity to buy Smith out if certain conditions are satisfied. Finally, the contract contains a clause requiring all disputes to be settled by an arbitral panel.[96]

Things work well for the first five years but then CISMC decides that it no longer wants to submit questions dealing with the operation of the plant to Smith. Furthermore, CISMC no longer wants to pay the amount required by the contract to Smith as a return of the initial investment. In short, CISMC wants to take over the plant and keep all

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95. The two parties chosen are fictitious. If they have any relation to a company in existence, it is purely coincidental. The facts and circumstances of this case are also fictitious and the author apologizes for any resemblance to any existing situation or entity.

96. For simplicity sake, a specific arbitral panel was not chosen so that an unnecessary discussion would not take place regarding what rules would govern the arbitration proceedings. Therefore, assume that a generic arbitral panel using generic rules heard the dispute.

profits earned in the Commonwealth within the Commonwealth. CISMC realizes a dispute exists, because Smith does not go along with what has been proposed, and therefore, as the contract requires it, and because both parties have indicated a willingness to abide by the clause requiring any dispute to be handled by arbitration, the dispute will be submitted to an arbitral panel.

The arbitrators hearing this dispute find that CISMC has breached its contract obligations. First, CISMC is required by the contract to submit all questions regarding operation of the plant to Smith. Second, CISMC is required to pay Smith a sum certain for ten years so that Smith can realize its initial investment. Third, CISMC did not follow the proper procedure necessary to buy Smith out and take control of the plant. Therefore, the arbitrators award Smith $2,000,000 in damages. Smith attempts to collect the award from CISMC through informal channels but this effort proves futile.

B. United States Citizen or Corporation Attempting to Enforce an Arbitral Award Within the United States

During the first five years of operation, CISMC had turned a considerable profit and, with the advice of Smith, had invested that profit in various ventures within the United States. These assets totalled some $2,000,000. Since Smith could not secure voluntary compliance of the arbitral award from CISMC, Smith turned to the courts in the United States to enforce the award rendered by the arbitral panel by transferring the CISMC assets found in the United States to Smith. CISMC believes that the award should not be enforced because it falls within the provisions of Article V of the Convention.[97]

There are two choices for courts in the United States in determining whether or not an arbitral award will be enforced when a United States citizen or corporation is involved in the dispute. First, the court may decide that the award is a domestic award and therefore, the Convention, along with its exceptions, does not apply to enforce the award.[98] If this is the situation, courts will apply the FAA and its narrow list of defenses in determining whether or not the award will be enforced.[99] In this hypothetical situation, any court would have a very difficult time defending a position that this is a domestic award because the

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97. To avoid an unnecessary discussion which goes beyond the scope of this Comment, assume that CISMC argues each and every exception found in Article V of the Convention as a defense to the enforcement of the arbitral award.

98. *See* Convention, *supra* note 7 and accompanying text, art. I, 21 U.S.T. 2517, 2519.

99. *See* FAA, *supra* note 11.

controversy clearly involves an international transaction between two parties of differing nationalities.[100] Therefore, the FAA is inapplicable to the case at hand and requires a court to apply the Convention.[101]

Second, since the court handling this dispute must apply the Convention, it must determine how it will interpret the exceptions found under Article V.[102] If the court gives a very broad reading to the exceptions, the party attempting to prove that the award should not be enforced will have a better opportunity to persuade the court not to enforce the award. On the other hand, if the court gives a narrow reading to Article V, the party arguing against enforcement will have a very difficult time of swaying the court to its side. This is where the double standard comes into play.

Applying what has been discussed in this section to the proposed hypothesis of this Comment, the conclusion can be reached that if a United States citizen or corporation believes that the award should be enforced, courts will give a narrow reading to the exceptions so that the other party will have a very hard time of procuring judgement in its favor. Alternatively, if the entity from the United States is the party attempting to resist enforcement by using an Article V exception, courts in the United States will give a broad interpretation of the exceptions thereby allowing the party to avoid its obligation under the arbitral award. Therefore, in the hypothetical case, the court hearing this dispute will give a very narrow reading to the Article V exceptions, thus allowing Smith to collect its award.

C. Foreign Citizen or Corporation Attempting to Enforce an Agreement Rendered by an Arbitral Panel in the United States

It is necessary to modify the hypothetical case in order to explain this situation. Instead of having CISMC breach the contract, Smith breaches the contract by not supplying the technical advice necessary for the continued success of the plant. Both parties agree to abide by the

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100. *See supra* note 9. The hypothetical situation does not fall within the definition of what constitutes a domestic award because the subject matter which is involved in the dispute is not so closely connected to the United States that it has priority over the dispute. Also, only one of the parties is an entity of the United States, therefore courts in the United States do not have automatic jurisdiction over the dispute.

101. Throughout this Comment it has been discussed that when an award is not classified as domestic, the Convention will be used in determining whether the award will be enforced. *See* Convention, *supra* note 7, art. III, 21 U.S.T. 2517, 2519.

102. The door is now open for the court to interpret the exceptions any way it desires because the exceptions found under Article V are so broadly stated. *See supra* note 94.

contractual clause which requires any dispute to be submitted to an arbitral panel. The arbitral panel decides that Smith has breached the contract and awards CISMC $2,500,000 in damages. CISMC attempts to collect the award from Smith, but Smith is unwilling to cooperate. Smith's assets, which would satisfy the award, are located in the United States. CISMC petitions federal courts in the United States to enforce the arbitral award. Smith argues according to Article V of the Convention that the award cannot be enforced.[103]

Courts have two options when a United States entity attempts to avoid enforcement of an arbitral award. First, the court can say that the award is, in reality, a domestic award and, therefore the Convention does not apply.[104] If a court were to apply this reasoning, the American party would be at a disadvantage because the FAA with its limited exceptions would apply and it would be very difficult for the court to withhold enforcement based on one of those exceptions. Therefore, a court would be unwilling to treat this award as domestic. Second, since the court must apply the Convention,[105] it is believed that the court will give a broad interpretation to the exceptions found under Article V so that the American entity can successfully combat the enforcement of the award.[106]

Based on what has been stated in this section and applying it to the proposed hypothesis of this Comment, one can understand how the courts in the hypothetical situation will apply the exceptions found under Article V of the Convention broadly so that Smith may avoid paying the amount required under the arbitral award just because Smith is an American corporation.

D. Application of the Enforcement Doctrine Found in the Convention by Courts Within the United States

Since the Supreme Court has not had a case dealing with the enforcement of an international arbitral award brought or argued before it, it is necessary to look at lower court decisions to determine if the proposed hypothesis stated at the beginning of this Comment is correct. Since the concept of solving international disputes through arbitration is relatively new,[107] there are very few cases dealing specifically with the

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103. *See supra* note 10.

104. *See supra* note 10 and accompanying text.

105. *See* Convention, *supra* note 7, art. III, 21 U.S.T. 2517, 2519.

106. The tables have been reversed and it is my belief that the courts in the United States will give a broad interpretation to the defenses when an American entity, such as Smith, tries to resist enforcement of the award.

107. *See* Carter, *supra* note 4, at 64.

issue. However, three leading cases give an indication of how courts in the United States deal with this issue.

The first case is *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier* (RAKTA),[108] in which an American corporation appealed from a district court decision affirming a foreign arbitral award. The foreign award held the American corporation liable to the Egyptian defendant. The Court of Appeals for the Second Circuit upheld the decision rendered by the district court, and in the process construed two exceptions to the convention narrowly so as to deny the American corporation any benefit that the exceptions may have offered.[109] The court reasoned that an expansive reading of the exceptions to the Convention would frustrate the purposes behind the Convention.[110]

A similar outcome was reached in *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*[111] Biotronik, a foreign corporation, brought suit in order to have a foreign arbitral award enforced against Medford, an American corporation. The district court hearing the dispute decided to enforce the foreign arbitral award because the advantages of arbitration and the considerations of international reciprocity require the protection of the integrity of arbitral awards and thus require a narrow construction of the defenses to the enforcement of these awards.[112]

Finally, in *Libyan American Oil Co. (LIAMCO) v. Socialist People's Libyan Arab Jamahirya (Libya),*[113] the United States District Court for the District of Columbia refused to enforce the foreign arbitral award against Libya when Libya invoked one of the exceptions provided by the Convention to the enforcement of the award.[114] This decision showed the court's willingness to use an exception provided by the Convention even though it was used against an American corporation.

Looking at these cases in isolation would clearly indicate that the proposed hypothesis is incorrect. However, one must consider what was

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108. 508 F.2d 969, 969 (2d Cir. 1974).

109. *Id.* The two exceptions discussed in this case were the public policy defense and the nonarbitrability defense. *See* Article V of the New York Convention, *supra* note 12.

110. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973-74 (2d Cir. 1974).

111. 415 F. Supp. 133 (D.N.J. 1976).

112. *Id.*

113. 482 F. Supp. 1175 (D.D.C. 1980), *vacated* 684 F.2d 1032 (D.C. Cir. 1981). This case was settled on March 20, 1981 while an appeal was pending to the court of appeals, which on May 6, 1981 vacated the district court decision without reason.

114. *Libyan American Oil,* 684 F.2d at 1179.

going on in the world at the time these three decisions were rendered. *Whittemore* was decided four years after the United States became a signatory to the Convention. It involved a corporation located in Egypt, a country the United States was desperately trying to keep in its favor due to the instability of the Middle East. With this background in mind, the argument can be made that this was a political decision rather than a decision consistent with established law. The courts involved wanted to show the world that the United States was willing to abide by the Convention and, at the same time, wanted to keep Egypt pleased by making sure corporations within its territory would not be denied a foreign arbitral award by a broad reading of the exceptions found in the Convention.

The reasoning behind the decision in *Biotronik* is similar to that found in *Whittemore*. Biotronik was a corporation located in West Germany. The cold-war was still going at full strength. The United States needed West Germany as an ally in Western Europe. West Germany was so close to the Soviet Union that a defensive strike could be mounted within minutes of an attack against the United States or any member of NATO.[115] The United States could not afford to upset any of its allies in Western Europe; this consideration could have been a factor in the court's decision in favor of Biotronik.

The decision reached in the *LIAMCO* case was rendered six years after the Convention became the law of the United States, thus indicating that courts within the United States may still have been unwilling to stray from the narrow interpretation made by previous courts of the exceptions in Article V of the Convention.[116] More importantly, the United States was greatly dependent upon the Middle East, including Libya, for oil. If the court involved had ruled the other way, the United States could have been severely disabled, since it was already in the midst of an energy crisis resulting from the tensions and controversy that existed in the Middle East. If the opposite decision had been reached, the United States could have been thrust deeper into an already existing depression which could have lasted for years. The court may have ruled in favor of Libya in order to avoid that possibility.

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115. The United States could not afford to upset West Germany because it needed that country to support a large contingency of U.S. military and nuclear weapons that could respond in an instant against the Soviet Union. Also, the United States was worried about the possible spread of communism into West Germany, so it needed to do everything it could do to prevent such an occurrence.

116. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 969 (2d Cir. 1974); Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976).

However, since there has not been a significant court decision for years dealing with the enforcement of foreign arbitral awards, it is hard to say whether the trend found in these three cases still holds fast today. In all likelihood, it does not. It has been more than twenty years since the United States became a signatory to the Convention. Courts are likely to interpret the exceptions more broadly than ever. Moreover, the world has drastically changed over the past twenty years. No longer must the United States worry about upsetting an ally located in Western Europe because the Soviet Union is no longer a valid threat to the United States Also, the United States learned its lesson during the 1970s and is no longer as dependent on the Middle East as it once was for the production and supply of oil. Therefore, United States courts can better afford to hand down decisions which may be unfavorable to foreign interests but which are beneficial to corporations and citizens that are members of its society.

V. CONCLUSION

Arbitration has become an important instrument available to parties drafting international agreements. It can be used to solve a dispute once the parties realize that the conflict cannot be resolved through informal channels and they desire to avoid the problems associated with formal legal proceedings.[117] However, arbitration is not free of problems. As this Comment has attempted to demonstrate, once an arbitral award is rendered a party may have a difficult time enforcing that award if the other party refuses to voluntarily comply with the arbitrator's decision. Recently, states of the world have come together to create an instrument that ensures that the party receiving a favorable arbitral judgement has some device to turn to in order to make other states enforce the award, even if the unfavorable decision goes against an entity which was a national of that state.[118]

The United States was slow to recognize arbitration as a viable alternative to solving disputes involving international transactions, as is demonstrated by its reluctance to become a signatory to the Convention.[119] In the period immediately following United States' adherence to the Convention, courts in this country strictly applied the Convention and narrowly interpreted the exceptions found under Article V of the

117. Parties want to avoid the high cost and unreasonable delay in having their dispute follow the normal course of going through their state's national court system or the other party's court system.

118. Convention, *supra* note 7.

119. *See supra* notes 57-70 and accompanying text.

Convention[120] to uphold virtually all petitions to enforce an arbitral award. However, as time changes, so does the world. The world we now live in is very different from that which existed only twenty years ago. No longer must the United States worry about fighting communism, or where its next barrel of oil is going to come from; therefore, courts have a greater opportunity to render decisions consistent with the law but contrary to these other interests.

Unfortunately, there have been very few court decisions dealing with the enforcement of arbitral awards that could be analyzed to help prove the hypothesis proposed in this Comment. However, with the various changes taking place within our world, the opportunity for such analysis will be available over the next decade. More disputes involving international agreements will exist due to the growing interdependence of the states of the world. Consequently, it cannot be determined whether or not the hypothesis asserted at the beginning of this Comment is correct. That decision must be left for another day. It can only be suggested that the hypothesis is correct because courts in the United States will find it necessary to protect national interests and spur the continued development of this nation by reading the exceptions found under Article V of the Convention broadly. The goal is to encourage both individuals and corporations to get involved in the international arena without worrying about outrageous foreign arbitral awards.

David M. Kall

120. *See supra* notes 108-116 and accompanying text.